CONTRACT OF SUBSCRIPTION—CONSIDERATION—A promise to contribute money to charitable, religious, or educational purposes, however laudable and morally binding, cannot be enforced upon any principle of contract law. Theory and decision are in irreconcilable conflict with the enforcement of such subscription promise. Many courts, however, seeing only what was to their mind the justice of the situation, have solved the question by cutting the Gordian knot and disregarding the fundamental principles of contracts. However proper this may be from the viewpoint of justice, good faith, or moral obligation, it can only be regarded as a piece of judicial legislation, violative of the governmental functions of the judiciary. In a recent case in Iowa,[1] that State has fallen in line with other jurisdictions in such summary solution of the problem.

To support the subscriber's promise, a consideration is essential. Consideration, according to the traditional definition, is either detriment incurred by the promisee or a benefit received by the promisor in exchange for the promise. Ordinarily, the subscription paper contains neither a request by the subscriber nor a promise by the beneficiary; the subscription usually is a mere gratuity. This objection has been conclusive to the English courts.[2] The American courts also, at first, found this difficulty insuperable, and all such subscriptions were held null and void for want of consideration.[3] The courts, however, had pronounced such defenses as "base and dishonorable," as well as "unjust," and soon found a way to declare them invalid as well.[4] The first attempt to steer clear of the difficulty was made in a New Hampshire decision,[5] where it was argued that when several persons subscribe a paper for some common public object, the promise of each is a consideration for the promise of the others, and the payee of the paper may enforce the promise against each subscriber. This seemed plausible, and a legal way of overcoming the objection, and it was accordingly adopted and approved, without much reflection, in several jurisdictions.[6] But, in most instances, the subscribers do not give their promises in exchange for each other, and, even if they do, and the mutual promises do form a sufficient consideration for each other

---

[1] Brokow v. McElroy, 143 N. W. Rep. 1087 (Ia. 1913).

[2] *In re* Hudson, 54 L. J. Ch. 811 (Eng. 1885).

[3] Boutell v. Cowden, 9 Mass. 254 (1812); Trustees v. Davis, 11 Mass. 112 (1814); Foxcroft Academy v. Favor, 4 Greenl. 332 (Me. 1826); Steward v. Trustees, 2 Denio, 403 (N. Y. 1845).

[4] See 16 Am. Law Reg. (N. S.) 548.

[5] Congregational Society v. Perry, 6 N. H. 164 (1833).

[6] Christian College v. Hendley, 49 Cal. 347 (1875); Hegert v. Trustees, 53 Ind. 326 (1876); Petty v. Trustees, 95 Ind. 278 (1883); Allen v. Duffie, 43 Mich. 1 (1880); Edenboro Academy v. Robinson, 37 Pa. 210 (1860).

so as to create a valid contract, it would be a contract between the co-signers only, and not between them and a third person. Now, in many States, a third person cannot sue on a contract made for his benefit; and in several of the States which allow a beneficiary to sue, he cannot bring the suit in his own name. Another view that beneficiary or its representatives imports a promise to apply the funds properly, and this promise supports the subscriber's promises.[7] This, it seems, is purely fictitious and forced reasoning. In a few cases,[8] the fact that other subscriptions have been induced has been held to be a good consideration. But, as Mr. Chief Justice Gray said in one case,[9] this is "inconsistent with elementary principles. Similar promises of third persons to the plaintiff may be a consideration for agreements between those persons and the defendant; but as they confer no benefit upon the defendant, and impose no charge or obligation upon the plaintiff, they constitute no legal consideration for defendant's promise to him." In *Beatty* v. *Western College,*[10] the court enforced the gift "upon the ground of estoppel, after the institution has extended moneys and incurred liabilities on the faith of the promise, and not by reason of any valid consideration in the original undertaking." This avoids the contractual difficulty only by substituting an infringement of the doctrine of estoppel.[11] The most generally accepted theory considers the subscription as an offer, which is made binding when the work for which the subscription was made has been done, or liability incurred in regard to such work, on the faith of the subscription.[12] This necessitates an implied request by the promisor that such liability be incurred—an implication of fact not usually justifiable.

By reference to the decisions cited in the foot notes, it will be seen that the same courts have often based their decisions on differ-

---

[7] Barnett v. Franklin College, 10 Ind. App. 103 (1893); Collier v. Baptist Soc., 8 B. Mon. 68 (Ky. 1847); Trustees v. Fleming, 10 Bush. 234 (Ky. 1874); Trustees v. Haskell, 73 Me. 140 (1882); Helfenstein's Estate, 77 Pa. 328 (1875); Trustees v. Nelson, 24 Vt. 189 (1852).

[8] Hanson Trustees v. Stetson, 5 Pick. 506 (Mass. 1827); Watkins v. Eames, 9 Cush. 537 (Mass. 1852), but this theory was discredited in Cottage St. Church v. Kendall, 121 Mass. 528 (1877); Comstock v. Howd, 15 Mich. 237 (1867), but see Northern R. R. v. Eslow, 40 Mich. 222 (1879); Irwin v. Lombard University, 56 Ohio St. 9 (1897).

[9] Cottage St. Church v. Kendall, 121 Mass. 528 (1877).

[10] 177 Ill. 280 (1898).

[11] See 12 H. L. R. 506.

[12] Miller v. Ballard, 46 Ill. 377 (1868); Trustees v. Garvey, 53 Ill. 401 (1870); Des Moines Univ. v. Livingston, 57 Ia. 307 (1881); First Church v. Donnell, 110 Ia. 5 (1899); Gittings v. Mayhew, 6 Md. 113 (1854); Albert College v. Brown, 88 Minn. 524 (1903); Pitt v. Gentle, 49 Mo. 74 (1871); Irwin v. Lombard Univ., 56 Ohio St. 9 (1897).

ent theories. This serves to show the confusion into which the has been advanced is that the acceptance of the subscription by the law has been thrown on this subject, due to the desire of the courts to enforce a promise binding in morals but not in law, in violation of well-settled principles of contract. If the policy of the State is promotive of education, religion and philanthropy, if it is desirable, from motives of public policy; that such subscriptions, although gratuities, should be enforced because numerous worthy institutions are absolutely dependent upon them, such enforcement should be obtained through suitable enactment by the legislature, and not through judicial legislation which is subvertive of the symmetry of our law.

Y. L. S.

DIVORCE—EXTERRITORIAL EFFECT—What exterritorial effect should a court give to a divorce granted by one State to its citizen from his non-resident wife who was domiciled in another State and not personally served by process? This mooted question arose in an Illinois case[1] where the court had to consider the validity of the defendant's former marriage in order to determine whether the second marriage was bigamous. After a marriage in New York, a husband left his wife and made California his domicil. He brought divorce proceedings against his wife, and although she was not personally served and did not appear, he secured the divorce. Subsequently, the wife remarried in New York and then left with her second husband for Illinois where they cohabited for ten years. The second husband, without obtaining a divorce from her, remarried in Illinois. To an indictment for bigamy, his defense was that his first marriage was invalid; for New York did not recognize the divorce obtained on the non-resident non-appearing defendant who was not personally served. The court, with two judges dissenting, held that the second marriage was not bigamous, as his first marriage in New York was void, his alleged wife being still married to her first husband at the time of her second marriage. The fact that Illinois, the *forum,* recognized the divorce was considered to be immaterial.

The dissenting judges considered the Illinois cohabitation for ten years as equivalent to a common law marriage, inasmuch as Illinois, contrary to New York, recognized the California divorce which rendered the alleged first wife of the defendant competent to contract a common law marriage with him.

The principal case, with its diverse opinions based on the laws of two States not in *accord,* very aptly discloses the fact that the

---

[1] People v. Shaw, 102 N. E. Rep. 1031 (Ill. 1913).